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## Breaking with Precedent, D.C. Circuit Holds FERC Lacks Authority to Issue Tolling Orders under the Natural Gas Act

On June 30, 2020, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) struck down the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) practice of issuing tolling orders that extend the time FERC may take to consider applications for rehearing of its orders under the Natural Gas Act (“NGA”). In a recent decision on en banc rehearing in *Allegheny Defense Project v. FERC*,<sup>1</sup> the D.C. Circuit ultimately denied landowners’ and environmental groups’ challenges to FERC’s approval of the Atlantic Sunrise interstate natural gas pipeline on the merits. However, the court’s rejection of FERC’s tolling order practice—which breaks with longstanding precedent and creates a circuit split—significantly affects proceedings under the NGA and likely implicates FERC’s rehearing procedures under the Federal Power Act (“FPA”).

The NGA requires natural gas companies to obtain a certificate of public convenience and necessity from FERC in order to construct and operate an interstate natural gas pipeline.<sup>2</sup> Once such a certificate is issued, the NGA confers upon certificate holders eminent domain authority to obtain necessary rights-of-way.<sup>3</sup>

The NGA further provides that before a party can seek judicial review of a FERC order, it must apply for rehearing of the order.<sup>4</sup> Upon receiving such an application, the NGA provides FERC the “power to grant or deny rehearing or to abrogate or modify its order without further hearing.”<sup>5</sup> If FERC does not act on the application for rehearing within 30 days, the application “may be deemed to have been

denied.”<sup>6</sup> Given the complexities inherent in its proceedings, FERC’s practice has often been to issue tolling orders intended to “act upon” the rehearing requests within the 30-day timeframe (*i.e.*, to avoid the requests from being deemed denied), without making a substantive merits decision on such requests. Petitioners in *Allegheny Defense Project* argued that FERC’s tolling order process unfairly stalls judicial review of FERC’s pipeline approvals, while pipelines are permitted by FERC and district courts to proceed with construction and exercise eminent domain authority, respectively, in the interim.

In its June 30 decision, the D.C. Circuit held that “under the plain statutory language and context, such tolling orders are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review.”<sup>7</sup> The D.C. Circuit determined that the tolling order in this case did not qualify as a “grant” of rehearing—one of the four actions permitted by FERC on rehearing under the text of the NGA—because the sole purpose of a tolling order was to prevent the rehearing requests from being deemed denied rather than to substantively engage with the requests. The D.C. Circuit further noted that the tolling order was issued by the FERC Secretary, which did not have delegated authority to “act upon” rehearing applications. According to the D.C. Circuit, the tolling order had the effect of eliminating the statutory 30-day timeframe and deemed-denied provisions, which FERC does not have the authority to do. Moreover, the court pointed out that Congress has specifically set forth in other contexts means

by which an agency may toll the time it takes to act, but had declined to do so here.

On July 6, 2020, FERC filed a motion for a 90-day stay of the court's mandate, which the court had ordered to be issued on July 7, 2020. FERC argued good cause exists for the stay because it will allow the Commission to evaluate how to revise its decades-long practice to implement the D.C. Circuit's decision and to decide whether to file a petition for writ of certiorari with the Supreme Court.<sup>8</sup>

### IMPLICATIONS OF THE D.C. CIRCUIT'S DECISION

The June 30 decision has various implications for FERC's rehearing procedures and the construction and operation of interstate natural gas pipelines.

First, the D.C. Circuit's decision does not necessarily require FERC to make merits decisions on rehearing requests by the 30-day mark. In its opinion, the majority only decided whether FERC's use of tolling orders was permissible under the NGA, but left open the question of whether FERC can grant rehearing "for the express purpose of revisiting and substantively reconsidering a prior decision, and need[s] additional time to allow for supplemental briefing or further hearing processes."<sup>9</sup>

In a concurring opinion, Judge Griffith suggests FERC is "free to grant rehearing by agreeing to consider the applicant's arguments for modifying or revoking its previous order—*i.e.*, by deciding to decide. Going forward, the Commission should receive the benefit of the doubt when it issues an order that announces a clear intention to reconsider the merits of the underlying order and a concrete step operationalizing that intent. **For example, the Commission would easily satisfy the Act by setting a briefing schedule or by ordering the pipeline company to respond to the claims made in the application.**"<sup>10</sup> Judge Griffith notes, however, that the court should consider granting mandamus relief if FERC's grants of rehearing in reality only cause undue delay.

Second, in breaking with its own longstanding precedent, the D.C. Circuit has now created a circuit split on FERC's authority to issue tolling orders. As Judge Henderson points out in a partial dissent, the D.C. Circuit is now the first court

of appeals to reject FERC's tolling order practice under the NGA.<sup>11</sup> The next step in resolving the circuit split may be a request by FERC for the Supreme Court to weigh in.

Third, because the D.C. Circuit's rejection of FERC's tolling order was premised on the text of the NGA, the June 30 decision affects not only pipeline certification proceedings involving landowners but also any other proceedings under the NGA. As amici in *Allegheny Defense Fund* have pointed out, the decision also has the potential to affect FERC's electric proceedings because "the Federal Power Act's provisions regarding rehearing parallel the language of the Natural Gas Act in all materials respects."<sup>12</sup> FERC acknowledged in its July 6 motion for stay that the D.C. Circuit's invalidation of tolling orders affects all requests for rehearing under the NGA, and presumably applies to rehearing requests under the FPA.<sup>13</sup>

Finally, the June 30 decision may have ripple effects in other areas of the pipeline construction process. Judge Griffith's concurrence opines that the judicial review consequences of tolling orders form one of three threads in the so-called "legal web that can ensnare landowners in pipeline cases."<sup>14</sup> FERC recently addressed the second thread—uninterrupted construction—by issuing revised regulations that prevent the agency from issuing pipeline construction authorizations until the merits of any timely-filed requests for rehearing are decided.<sup>15</sup> With respect to the third thread—eminent domain—Judge Griffith argues that district courts should hold eminent domain proceedings in abeyance until the Commission completes the rehearing process.<sup>16</sup>

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See footnotes on the following page

1. *Allegheny Defense Project v. FERC*, 17-1098 (D.C. Cir. June 30, 2020).
- 2 15 U.S.C. § 717f(c) (2018).
3. *Id.* § 717f(h).
4. *Id.* § 717r(a).
5. *Id.*
6. *Id.*
7. *Allegheny Defense Project v. FERC*, slip op. at 4.
8. Motion of Federal Energy Regulatory Commission to Stay Issuance of Mandate, *Allegheny Defense Project v. FERC*, No. 17-1098 (July 6, 2020) [hereinafter Motion for Stay].
9. *Id.* at 29-30.
10. *Id.* (Griffith, J. concurring) at 3 (emphasis added) [hereinafter Griffith Concurrence].
11. *Id.* (Henderson, J. concurring in the judgment, dissenting in part) at 3 (citing to decisions in the First, Fourth, and Fifth Circuit upholding FERC's use of tolling orders).
12. Brief of the Edison Electric Institute as *Amicus Curiae* in Support of Respondent, *Allegheny Defense Project v. FERC*, No. 17-1098 at 2 (Feb. 18, 2020) (Comparing 15 U.S.C. § 717r(a) with 16 U.S.C. § 825(a)).
13. Motion for Stay at 5.
14. Griffith Concurrence at 1.
15. *See* Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, Order No. 871, 171 FERC ¶ 61,201 (2020). FERC's revised regulations apply both to projects certificated under section 7 of the NGA (*e.g.*, interstate gas pipelines) and those under section 3 of the NGA (*e.g.*, LNG terminals).
16. Alternatively, Judge Griffith suggests taking a closer look at the possibility that once FERC grants rehearing of a certificate order, the order should be considered nonfinal and invalid for purposes of transferring property by eminent domain. *See* Griffith Concurrence at 6.